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Pius Emmanuel David v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–297–12 OF 2013
AZIAH ALI, AHMADI ASNAWI AND ZAMANI A RAHIM JJCA
17 NOVEMBER 2015

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Offence of drug trafficking — Defence of innocent carrier — Whether defence probable — Whether ingredient of trafficking established — Allegations that proceeding not properly interpreted to accused person — Whether there was a court interpreter present — Whether there was miscarriage of justice — Dangerous Drugs Act 1952, s 39B(1)(a)*

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A police inspector ('PW3') had received information that a certain drug trafficking activity would take place at a bus station. The police arrived at the bus station and the appellant was seen walking from the direction of the ticket counter towards the parking bay area opposite the ticket counter, carrying a black-orange coloured bag. PW3 approached the appellant and identified himself as the police. The appellant attempted to run away but was stopped by PW4 and the two other members of the team. PW3 removed some clothes from the bag and underneath the clothes were compressed packages suspected to be dangerous drugs. The appellant, a Nigerian national, was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the prosecution's case, the trial judge found that the appellant had custody and control of the bag in which the drugs were found. Therefore, the appellant had custody and control of the drugs. The trial judge invoked the presumption of knowledge and possession under s 37(d) of the Act and, based on the evidence, found that the appellant's act of carrying the drugs fell within the definition of 'trafficking' under s 2 of the Act. The trial judge found that the prosecution had established a prima facie case and the appellant was ordered to enter his defence. The defence case was that the appellant was an innocent carrier. The trial judge found that the appellant's defence was a fabrication and an afterthought and that the defence failed to rebut the presumption under s 37(d) on a balance of probabilities and failed to raise a reasonable doubt in the prosecution case. The appellant was consequently found guilty and convicted. Hence, the present appeal. The appellant submitted that the proceeding in the court below was not properly interpreted to the appellant although there was a court interpreter present. It was contended that this has resulted in a miscarriage of justice.

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Held, dismissing the appeal and affirming the conviction and sentence of the High Court:

(1) There was no error committed by the trial judge in his finding. The prosecution had adduced evidence that at the time of arrest, the appellant had custody and control of the bag. Apart from the drugs, the appellant's clothes were also inside the bag. The prosecution needed only prove the primary facts of custody and control of the bag to enable the court to draw the presumptions of knowledge and possession against the appellant (see para 10).

(2) The appellant was caught with more than 6kgs of cannabis in his bag. The large quantity of drugs raised the reasonable inference that it was not for his personal consumption. In any event it was not the appellant's defence that the drugs was for his personal consumption. A person who is found to be in control and custody of dangerous drugs is deemed to be in possession if the presumption under s 37(d) is invoked and to have known the nature of such drug. The appellant failed to rebut the presumption under s 37(d) on a balance of probabilities. The trial judge was correct in finding that the appellant was trafficking in the drugs as the definition of 'trafficking' under s 2 of the Act included 'carrying'. The appellant failed to raise a reasonable doubt in the prosecution case (see para 44).

(3) In court proceedings, there will always be an interpreter present whose duty is to interpret the proceedings to the accused in the language that the accused understands. The notes of proceedings did not show that concerns were raised by the defence regarding the competency of the court interpreter. There was nothing in the notes of proceedings to show that interpretation of the proceedings was an issue before the court below. On the contrary, the notes of proceedings showed that the appellant could communicate and understand English as demonstrated by him when he testified in his defence in English. It would be improbable for the trial judge to have proceeded with the hearing if he was satisfied that the appellant could not understand the proceedings (see para 22).

[Bahasa Malaysia summary

Ketua polis ('PW3') telah menerima maklumat bahawa kegiatan pengedaran dadah akan berlaku di stesen bas. Polis telah tiba di stesen bas itu dan perayu dilihat berjalan dari arah kaunter tiket menuju ke kawasan letak kereta bertentangan kaunter tiket itu, membawa beg berwarna hitam-jingga. PW3 mendekati perayu dan memperkenalkan dirinya sebagai polis. Perayu telah cuba melarikan diri tetapi ditahan oleh PW4 dan dua orang lain daripada kumpulan itu. PW3 telah mengeluarkan beberapa pakaian daripada beg itu dan di bawah pakaian itu terdapat bungkusan mampan disyaki dadah berbahaya. Perayu, seorang warganegara Nigeria, telah didakwa atas kesalahan

di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Di akhir kes pendakwaan, hakim perbicaraan mendapati bahawa perayu mempunyai jagaan dan kawalan beg itu di mana dadah itu dijumpai. Oleh itu, perayu mempunyai jagaan dan kawalan dadah itu. Hakim perbicaraan menggunakan andaian pengetahuan dan milikan di bawah s 37(d) Akta tersebut dan, berdasarkan keterangan, mendapati tindakan perayu membawa dadah itu terangkum dalam tafsiran 'trafficking' di bawah s 2 Akta tersebut. Hakim perbicaraan mendapati bahawa pendakwaan telah membuktikan kes prima facie dan perayu telah diperintahkan untuk memasuki pembelaannya. Kes pembelaan adalah bahawa perayu ialah pembawa yang tidak bersalah. Hakim perbicaraan mendapati bahawa pembelaan perayu adalah satu pemalsuan dan suatu yang telah difikirkan kemudian dan bahawa pembelaan telah gagal untuk menimbulkan keraguan munasabah dalam kes pendakwaan. Perayu kemudian didapati bersalah dan disabitkan. Justeru, rayuan ini. Perayu berhujah bahawa prosiding di mahkamah bawahan tidak ditafsir sewajarnya kepada perayu meskipun terdapat jurubahasa mahkamah yang hadir. Ia dihujahkan bahawa ini telah mengakibatkan keadilan tidak dilaksanakan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman Mahkamah Tinggi:

(1) Tiada kesilapan dilakukan oleh hakim perbicaraan dalam penemuan beliau. Pendakwaan telah mengemukakan keterangan pada masa tangkapan, perayu mempunyai jagaan dan kawalan beg itu. Selain daripada dadah itu, pakaian perayu juga dalam beg itu. Pendakwaan hanya perlu membuktikan fakta utama jagaan dan kawalan beg itu bagi membolehkan mahkamah membuat andaian pengetahuan dan milikan terhadap perayu (lihat perenggan 10).

(2) Perayu telah ditangkap dengan lebih daripada 6kg kanabis dalam begnya. Kuantiti dadah yang banyak itu menimbulkan inferens munasabah bahawa ia bukan untuk kegunaannya sendiri. Dalam apa-apa keadaan ia bukan pembelaan perayu bahawa dadah berbahaya itu dianggap dalam milikan jika andaian di bawah s 37(d) digunakan dan mengetahui sifat dadah tersebut. Perayu telah gagal mematahkan andaian di bawah s 37(d) atas imbangan kebarangkalian. Hakim perbicaraan adalah betul kerana mendapati perayu mengedar dadah seperti dalam tafsiran 'trafficking' di bawah s 2 Akta tersebut termasuk 'carrying'. Perayu telah gagal untuk menimbulkan keraguan munasabah dalam kes pendakwaan (lihat perenggan 44).

(3) Dalam prosiding mahkamah, jurubahasa akan sentiasa hadir yang mana kewajipannya adalah untuk mentafsir prosiding kepada tertuduh dalam bahasa yang difahami tertuduh. Nota-nota prosiding tidak menunjukkan bahawa kemusykilan ditimbulkan oleh pembelaan berhubung kecekapan jurubahasa mahkamah. Tiada apa-apa dalam nota

prosiding untuk menunjukkan bahawa pentafsiran prosiding adalah satu isu di hadapan mahkamah bawahan. Sebaliknya, nota-nota prosiding menunjukkan bahawa perayu boleh berkomunikasi dan memahami bahasa Inggeris seperti yang ditunjukkan olehnya apabila dia memberi keterangan pembelaannya dalam bahasa Inggeris. Ia tidak munasabah untuk hakim perbicaraan meneruskan perbicaraan jika beliau berpuas hati bahawa perayu tidak boleh memahami prosiding itu (lihat perenggan 22).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

Chean Siong Guat v PP [1969] 2 MLJ 63 (refd)
Chong Ching Yuen v The Hong Kong Special Administrative Region [2004] HKCFA 16 (refd)
Isidro Leonardo Quito Cruz v PP [2013] 2 MLJ 1; [2013] 2 CLJ 1025, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (folld)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64; [1980] 1 LNS 181, PC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
R v Pointon [1985] 1 NZLR 109, CA (refd)
Shamim Reza bin Abdul Samad v PP [2011] 1 MLJ 471; [2009] 6 CLJ 93, FC (folld)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)
Wan Marzuki bin Wan Abdullah v PP [2010] MLJU 2092; [2013] 1 CLJ 177, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a), First Schedule

Appeal from: Criminal Trial No 45A-52–09 of 2012 (High Court, Alor Setar)

Srimurugan (Jamil Shafie with him) (Jamil Mohamed Shafie & Assoc) for the appellant.
Muhamad Yasser bin Mohd Nasri (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA:

INTRODUCTION

[1] The appellant, a Nigerian national was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') which reads as follows:

> Bahawa kamu pada 25.1.2012 jam lebih kurang 9.15 malam di stesyen bas Jalan Pekan Lama, Sungai Petani, di dalam daerah Kuala Muda, di dalam Negeri Kedah Darul Aman, telah mengedar dadah berbahaya iaitu cannabis seberat 6488.80 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the conclusion of the trial, the judge found the appellant guilty as charged. He was convicted and sentenced to death. We heard the appellant's appeal and having considered the appeal records and the submissions of learned counsel for the appellant and the learned deputy public prosecutor ('DPP'), we dismissed the appeal. We now give our reasons.

THE PROSECUTION'S CASE

[3] On 25 January 2012 Insp Al Husin bin Halil ('PW3') had received information that drug trafficking activity would take place at the bus station in Sungai Petani. PW3 then called his team and gave a briefing. There were seven members present, including Detective Corp Roslan bin Mansor ('PW4'). After the briefing, the members broke up into two teams. One team was led by PW3 himself and the other by one Detective Corp Dahlan. They arrived at the Sungai Petani bus station at about 8.30pm.

[4] At approximately 9.15pm, PW3 saw a man (identified as the appellant) walking from the direction of the ticket counter towards the parking bay area opposite the ticket counter. The appellant was carrying a black-orange coloured bag (exh P25) which was slung over his right shoulder. The appellant was alone. PW3 approached the appellant and signalled to PW4 and two other members of his team to follow him. PW3 then held the appellant's shoulder and identified himself as the police. The appellant attempted to run away but was stopped by PW4 and the two other members of the team.

[5] PW3 searched the appellant's body but did not find any illicit item. The appellant was asked to open the bag. PW3 removed some clothes from the bag and underneath some clothes he saw compressed packages which he suspected to be dangerous drugs. PW3 directed PW4 to handcuff the appellant and he informed the appellant the reason for his arrest. PW3 then brought the

appellant and the exhibits seized to the Kuala Muda District Police Headquarters where PW3 conducted a more thorough search of the bag. Apart from clothes, PW3 recovered seven compressed packages suspected to be dangerous drugs (exhs P9, P11, P13, P16, P18, P20 and P22). PW3 marked the exhibits seized and prepared a search list (exh P23). PW3 explained to the appellant exh P23 in the English language. PW3 then lodged Sungai Petani Report No 2804/12 ('the Sungai Petani report') and handed the appellant and the exhibits to the investigating officer ('IO') Insp Sohaimi bin Saad ('PW5'). Both PW3 and PW5 signed a 'Borang Serah Menyerah' (exh P24).

[6] PW5 marked the exhibits handed to him by PW3. He then put the exhibits in a box and he kept the box inside a locked cupboard in his office. He held the key to the cupboard. On 26 January 2012 at about 1pm, PW5 directed police photographer Corp Rani bin Omar ('PW1') to take photographs of the exhibits (exh P1(A)–(M) and of the appellant wearing the clothes seized (exh P1(N) and (O)). The clothes fitted the appellant. Then PW5 together with PW3 took PW1 to the scene where PW1 took three photographs (exh P1(P), (Q) and (R)).

[7] PW5 agreed under cross-examination that a statement was recorded from the appellant (exh D1). The defence adduced exh D1 through PW5. PW5 agreed that in exh D1, the appellant had mentioned the name 'Jeff' but he did not carry out any investigation on 'Jeff'. According to PW5, 'Jeff' was just a nickname, not an actual name. PW5 also did not investigate the two sim cards in the two handphones (exhs P33 and P34) that were recovered from the appellant.

[8] On 29 January 2012, PW5 packed the seven compressed packages into a box (exh P7) and sent them to the chemistry department to be analysed. The box was handed over to the government chemist Marhayani bt Md Saad (PW2) who acknowledged receipt (exh P5). PW2 analysed the contents of the seven packages and found them to be cannabis which weighed 6,488.8g. Cannabis is listed in the First Schedule to the Act. PW2 then prepared the chemist report (exh P6).

FINDINGS OF THE TRIAL JUDGE

[9] At the end of the prosecution's case, the trial judge found that the appellant had custody and control of the bag in which the drugs were found. Therefore the appellant had custody and control of the drugs. The trial judge invoked the presumption of knowledge and possession under s 37(d) of the Act and, based on the evidence, found that the appellant's act of carrying the drugs falls within the definition of 'trafficking' under s 2 of the Act. The trial judge

found that the prosecution has established a prima facie case and the appellant was ordered to enter his defence.

[10] We find no error committed by the trial judge in his finding. The prosecution had adduced evidence that at the time of arrest, the appellant had custody and control of the bag. Apart from the drugs, the appellant's clothes were also inside the bag. The prosecution need only prove the primary facts of custody and control of the bag to enable the court to draw the presumptions of knowledge and possession against the appellant (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 (FC)). The trial judge is therefore justified in invoking the presumption under s 37(d) of the Act. On the issue of trafficking, it is not disputed that the appellant was arrested at the Sungai Petani bus station. His presence at the bus station indicated that he had arrived from somewhere and had intended to travel from Sungai Petani to another place together with the bag. We agree with the trial judge that the appellant's act of carrying the bag from one place to another falls within the definition of 'trafficking' under s 2 of the Act.

THE DEFENCE'S CASE

[11] The appellant was the sole witness for the defence. He testified in English. The appellant testified that in July 2010, he had come to Malaysia initially as a tourist but had later decided to study English at the International Language Centre in Ampang. He was supported financially by his two brothers who were in London.

[12] Approximately one week before his arrest, the appellant said that he had difficulty to pay his house rent. He could not contact his brothers in Nigeria. He then asked for help from a fellow Nigerian known as 'Jeff'. He said that he had known Jeff since he arrived in Malaysia. Jeff had been in Malaysia for about two years. The appellant said that Jeff's full name is 'Jephta'. Jeff then asked the appellant to collect his luggage in Alor Setar. In his cautioned statement exh D1, the appellant said that Jeff promised to pay him RM2000. Jeff told him the luggage contained jade stones. The appellant was given a computer printed invoice and cash of RM500 as an advance. Jeff had also given him a mobile phone number which was not a Malaysian number. The appellant was to call a man by the name of 'Ali'.

[13] On the night of 24 January 2012 the appellant took a bus from Kuala Lumpur to Alor Setar. He arrived in Alor Setar on the early morning of 25 January 2012. He then contacted 'Ali' on the number that Jeff had given to him. Ali asked the appellant to take a taxi to Changlun and to wait at 'Restoran Seven Star' and somebody would meet him and show him a place to lodge. In Changlun, the appellant waited at the restaurant. Then a man whose identity

was unknown to the appellant came in a Myvi car to meet him. The stranger then took him to a motel nearby. This man asked for his bag (exh P25) which contained his clothes. The appellant was told that the jade would be put inside the bag. This man then left with his bag.

[14] The appellant then called Ali but Ali told him to wait. However the appellant said that he felt impatient and decided to buy a bus ticket to Kuala Lumpur. He called Ali again but Ali said that his friend had also bought a ticket for the appellant.

[15] At about 7pm, another man came. This was not the same man who had met him earlier. This man asked the appellant to follow him and told him that he was taking the appellant to Sungai Petani. He told the appellant that his friend in Sungai Petani had bought a bus ticket for the appellant. The appellant told this man that he had bought a ticket but this man told the appellant that Alor Setar and Changlun were not safe and not good for the appellant apparently because of gangsters. The appellant said that this man told him that his bag was in the car boot.

[16] On arrival at the Sungai Petani bus station, the man parked his car and asked the appellant to alight from the car. The appellant said that there was another man standing beside the car. According to the appellant, the man who had driven him to Sungai Petani told him that this person was his friend who had bought the bus ticket. The man who had driven him to Sungai Petani then took out the bag from the boot of the car and handed the bag to the appellant and asked the appellant to follow his friend. He then left and the appellant followed the other man. According to the appellant, this other man then asked the appellant where he was going but the appellant did not answer. This man then directed him to the ticket counter. The appellant alleged that this other man was PW3.

[17] The appellant said he decided to buy a ticket again. As he was walking towards the ticket counter, somebody hit him from behind and as he turned, he noticed several people around him. They covered his face with his t-shirt and told him that they were from the police. He was then handcuffed and put inside a car. His bag was placed in between his legs. He was then taken to the police station where the bag was opened and seven slabs of cannabis were found together with his clothes.

[18] The appellant stated that he had with him the invoice that Jeff had given him, his school fee receipt, proof from the Ministry of Education, a diary, a bible and a bunch of keys and a Thai sim card. After his arrest, his Thai wife came from Thailand and the police gave her the bible, the keys, the Thai sim card, his school fee receipt and the approval from the Ministry of Education.

He said that he had told the police officer to hand over these items to his Thai wife. The items were handed over to his wife in front of him.

[19] The appellant denied any knowledge of the drugs. He denied that the reason he went to Kedah was to collect the drugs to deliver to Jeff in Kuala Lumpur. The defence case is that the appellant was an innocent carrier.

FINDING BY THE TRIAL JUDGE

[20] The trial judge found that the appellant's defence is a fabrication and an afterthought and that the defence has failed to rebut the presumption under s 37(d) on a balance of probabilities and has failed to raise a reasonable doubt in the prosecution case. The appellant was consequently found guilty and convicted.

THE APPEAL

[21] At the outset of the hearing of the appeal before us, learned counsel for the appellant contended that the proceedings in the court below was not properly interpreted to the appellant although there was a court interpreter present. It was contended that this has resulted in a miscarriage of justice. The DPP however submitted that there was a Chinese interpreter who had interpreted the proceedings from Bahasa Malaysia to the English language. The appellant was asked whether he had needed an interpreter but had said that he could understand English and agreed for the trial to proceed.

[22] We had considered this issue and we find no ground to disbelieve the DPP. We take judicial notice that in court proceedings there will always be an interpreter present whose duty is to interpret the proceedings to the accused in the language that the accused understands. The notes of proceedings do not show that concerns were raised by the defence regarding the competency of the court interpreter. There is nothing in the notes of proceedings to show that interpretation of the proceedings was an issue before the court below. On the contrary, the notes of proceedings show that the appellant can communicate and understand English as demonstrated by him when he testified in his defence in English. In our opinion, it would be improbable for the trial judge to have proceeded with the hearing if he was satisfied that the appellant could not understand the proceedings. We therefore find no merit in the complaint raised.

[23] The grounds of appeal raised before us by learned counsel may be summarised as follows:

(a) the trial judge had failed to allow sufficient time for the appellant to appoint a new competent counsel;

(b) the prosecution in its opening statement had stated that the case against the appellant would be proved through direct evidence but later raised the presumption under s 37(d) and relied on s 2 of the Act;

(c) the search list exh P23 was not interpreted or properly explained to the appellant before he signed it;

(d) the Sungai Petani report was not adduced during the trial;

(e) the IO had failed to investigate 'Jeff' and the two handphone sim cards to verify whether the appellant had contacted 'Ali'; and

(f) the inconsistencies between the evidence of PW3 and PW4.

[24] On the first issue of failure by the court below to accord to the appellant sufficient time to appoint a new counsel, allegedly because the defence counsel in attendance was incompetent, learned counsel referred us to the proceedings on 9 July 2013 (p 28 of the appeal record). However for the purpose of ascertaining whether the appellant had not been given sufficient time to appoint another counsel as contended, we find that it is necessary to peruse not just p 28 but the following pages as well.

[25] The notes of proceedings show that on 9 July 2013 the appellant's counsel was one Mr B Murthy. PW3 had completed his testimony. After a short stand down, the court resumed sitting at 11.46am when the appellant indicated to the court that he wished to be offered an alternative charge and to appoint another counsel. The court then adjourned proceedings to 29 July 2013 for continued hearing.

[26] On 29 July 2013, Mr B Murthy was present. The notes of proceedings show that there were two adjournments and when court resumed at 11.34am, the appellant informed the court that he had informed his brother who had promised to pay one Mr Rayer, a lawyer. However Mr Rayer, who was present in court, informed the court that the appellant's brother had called him. Mr Rayer had informed the appellant's brother about his retainer fees but the appellant's brother failed to call him back. The court then set 19 August 2013 for mention of the case and 4 September 2013 for continued hearing.

[27] On 19 August 2013, Mr Rayer informed the court that he had not received any instructions. The case was then adjourned for continued hearing on 4 September 2013, as scheduled.

[28] On 4 September 2013 the hearing could not start in the morning because the learned DPP had requested for time to get the exhibits in order. The court adjourned hearing to 2.30pm but hearing commenced only at

3.06pm with the testimony of PW4. There appeared to be no further request made by the appellant to change his counsel.

[29] Having perused the notes of proceedings as above, we were unable to agree with learned counsel that the court had failed to give sufficient time for the appellant to appoint a new counsel. It is clear that the appellant had more than ample time from 9 July–4 September 2013, when the trial resumed, to appoint a new defence counsel. On the resumption of trial on 4 September 2013, no objection was raised to Mr B Murthy to continue as defence counsel.

[30] Learned counsel had contended that the defence counsel was incompetent. In reply the learned DPP referred us to the case of *Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471; [2009] 6 CLJ 93 and submitted that incompetence of the defence counsel, if any, must be flagrant so as to deprive the appellant of a fair hearing. It was submitted that no such incompetence had been shown in this case.

[31] In *Shamim Reza bin Abdul Samad v Public Prosecutor*, Gopal Sri Ram FCJ (as he then was) referred to the judgment of Bokhary PJ in the Hong Kong Court of Final Appeal case of *Chong Ching Yuen v The Hong Kong Special Administrative Region* [2004] HKCFA 16. In his judgment, Bokhary PJ in turn referred to the judgment of Cooke J in the Court of Appeal of New Zealand case of *R v Pointon* [1985] 1 NZLR 109, wherein Cooke J said that it is necessary 'to be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel'.

[32] We have perused the notes of proceedings before us and we find that we can do no better than to respectfully adopt the gist of what Gopal Sri Ram FCJ had said in *Shamim Reza*'s case that the trial could perhaps have been conducted with greater competence than that displayed by counsel who appeared for the appellant at his trial. But there was, on the material provided to us, no flagrant incompetence. We agree with the learned DPP that learned counsel has failed to show that the defence counsel in the court below was flagrantly incompetent so as to occasion a miscarriage of justice.

[33] The second issue raised pertains to the prosecution's opening statement. Learned counsel had submitted that in the opening statement, the prosecution had indicated that it would prove its case based on direct evidence. Therefore it was submitted that the trial judge has erred in allowing the prosecution to raise the presumption under s 37(d) and to rely on s 2 of the Act.

[34] The contents of the opening statement should not be taken as conclusive so as to disallow any further evidence to be adduced irrespective of

it being fresh or consequential. An opening statement in any trial should be taken as merely a guide to the court and the parties before it of the evidence likely to be adduced in order to prove or rebut a charge, claim or defence thereof. Indeed, an opening statement should not be allowed to lock out any fresh or clarifying evidence which may be relevant and necessary in the interest of justice (per Richard Malanjum CJ Sabah and Sarawak, in *Wan Marzuki bin Wan Abdullah v Public Prosecutor* [2010] MLJU 2092; [2013] 1 CLJ 177).

[35] We have perused the opening statement of the prosecution (pp 164–165 appeal record). In summary the prosecution had stated as follows:

(a) the prosecution will adduce direct evidence through witnesses who were members of the arresting party, the chemist, the photographer and the IO;

(b) the prosecution will adduce direct evidence that:

(i) the appellant was arrested by the cpmplainant, Insp Al Husin bin Halil and his team at the Sungai Petani bus station;

(ii) at the time of arrest, the appellant was carrying a bag;

(iii) a search of the bag revealed seven compressed packages suspected to be cannabis, some clothes, a pair of slippers, cash in RM and Thai baht and a photocopy of the appellant's passport; and

(c) the chemist will be called to confirm that the substance seized is 6488.80g of cannabis.

However there is no indication as to whether the prosecution was going to prove possession by direct evidence and rely on the presumption under s 37(da) or whether it was going to rely on ss 37(d) and 2 of the Act, but the notes of proceedings show that the prosecution did adduce evidence through its witnesses to prove what it had stated in the opening statement.

[36] In the written submissions at the close of the prosecution case, the learned DPP had submitted that the prosecution had proved by direct evidence that the appellant had custody and control of the bag and, coupled with his conduct of attempting to escape, the prosecution had proved mens rea possession. Based on the large quantity of the cannabis, the appellant was trafficking the drugs as defined under s 2 of the Act. In the alternative, the prosecution submitted that should the court find that there is insufficient evidence to prove mens rea possession, then the court was urged to invoke the presumption under s 37(d) of the Act. The trial judge invoked s 37(d) and applied s 2 of the Act.

[37] We have earlier stated that the prosecution had adduced evidence of the basic facts of custody and control of the bag. When there is evidence only of the basic facts, the trial judge has not erred when he invoked the presumption (see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

[38] In the written submissions by the defence at the end of the defence case, it was submitted as follows (p 121 appeal record):

> 6. Memandangkan Tertuduh telah memberi keterangan atas sumpah dan memberitahu mahkamah Yang Arif bagaimana beliau didapati menggalas beg galas (P25) yang mengandungi ketulan cannabis tanpa pengetahuannya pada tarikh, masa dan tempat berkenaan pihak pembelaan berhujjah bahawa Tertuduh berjaya membangkitkan keraguan terhadap pertuduhan di bawah Sek 39B(1)(a) Akta Dadah Berbahaya 1952 atas imbangan keberangkalian.

Having considered the submissions made, we are of the considered view that no disadvantage had been caused to the defence by the opening statement since the defence was focussed on its contention that the appellant was an innocent carrier.

[39] The next issue raised was with regard to the search list exh P23. Learned counsel submitted that PW3 had failed to explain P23 to the appellant. We have perused the testimony of PW3 where he had said that he had explained the contents of P23 to the appellant in English even though he had written P23 in Bahasa Malaysia. The trial judge had accepted his explanation. We have no reason to disagree with the trial judge. The appellant is a foreigner. In the circumstances, it would have been reasonable and probable for PW3 to communicate with the appellant in English rather than in Bahasa Malaysia. As we have stated earlier, the appellant is able to communicate in English and there is no suggestion that PW3 is unable to speak English. We have no hesitation to dismiss this contention by learned counsel.

[40] Next, learned counsel submitted that the prosecution had failed to adduce the Sungai Petani report made by PW3 after he had marked the exhibits seized. Learned counsel contended that without this police report, there is no evidence whether the drugs seized are the same drugs sent to the chemist to be analysed. It was further submitted that the defence counsel ought to have obtained the police report and have it translated into English and to get instructions from the appellant as to whether the police report shows what had transpired at the Sungai Petani bus station. In reply the learned DPP submitted that the prosecution did not tender the report as it was not part of the prosecution case.

[41] It is clear from the evidence of PW3 that the Sungai Petani report is not a first information report ('FIR'). We are of the view that the contention by

learned counsel that without this report, there is no evidence that the drugs seized were the same drugs sent to the chemist, is misplaced. We find that there is no evidence to show that there had been a break in the chain of evidence as to the identity of the drugs seized, analysed by the chemist and eventually produced and identified in court by the relevant witnesses. There is sufficient evidence adduced to show that the drug exhibits had been properly handled. Further, since PW3 was not cross-examined or challenged over the report, there was no basis for learned counsel to now submit that this report ought to have been produced.

[42] It was further submitted that PW5 had failed to investigate 'Jeff' that was mentioned by the appellant in his cautioned statement exh D1. Learned counsel submitted that the IO ought to have examined the two handphone sim cards recovered from the appellant. We have perused the statement exh D1. Apart from giving the full name of Jeff, no further details were provided about Jeff. The appellant did not inform PW5 about any telephone number or address of Jeff. There is no evidence that the appellant had mentioned 'Jeff' to PW3 at the time he was arrested. He only mentioned 'Jeff' in exh D1 which was recorded about three days after his arrest. If it is true that 'Jeff' existed, the appellant could have and should have given Jeff's telephone number to either PW3 or PW5 at the first available opportunity. We find that the appellant's defence lacked credible evidence that Jeff existed. The appellant's failure to provide relevant information about 'Jeff' for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him (*Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733). The trial judge has not erred in finding that the defence is an afterthought. By making this finding, we find that the trial judge has sufficiently met the requirement of the *Radhi*'s direction.

[43] Learned counsel had also raised alleged discrepancies between the testimony of PW3 and PW4 regarding whether the bag had fallen to the ground at the time of arrest. It was also submitted that PW4 was not telling the truth when he said that the appellant was ordered by PW3 to open the bag after he was handcuffed. With regard to discrepancies in witness testimonies, we are guided by what Abdul Hamid J (as he then was) said in *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63 at p 64 as follows:

> Absolute truth is I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common experience. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognised by the court.

We are of the view that these discrepancies are not material as the discrepancies did not detract from the fact that the appellant was arrested together with the bag and the drug exhibits were found inside the bag.

A CONCLUSION

[44] The appellant was caught with more than 6kgs of cannabis in his bag. The large quantity of drugs raises the reasonable inference that it was not for his personal consumption (*Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181). In any event it was not the appellant's defence that the drugs was for his personal consumption. A person who is found to be in control and custody of dangerous drugs is deemed to be in possession if the presumption under s 37(d) is invoked and to have known the nature of such drug (*Isidro Leonardo Quito Cruz v Public Prosecutor* [2013] 2 MLJ 1; [2013] 2 CLJ 1025 (FC)). We agree with the trial judge that the appellant has failed to rebut the presumption under s 37(d) on a balance of probabilities. The appellant was carrying the drugs from Changlun to Sungai Petani. His intended destination was Kuala Lumpur. We find that the trial judge is correct in finding that the appellant was trafficking in the drugs as the definition of 'trafficking' under s 2 of the Act includes 'carrying'. The appellant has failed to raise a reasonable doubt in the prosecution case.

[45] For the reasons stated above, we dismissed the appeal and affirmed the conviction and sentence imposed by the High Court.

Appeal dismissed and affirming the conviction and sentence of the High Court affirmed.

Reported by Afiq Mohamad Noor